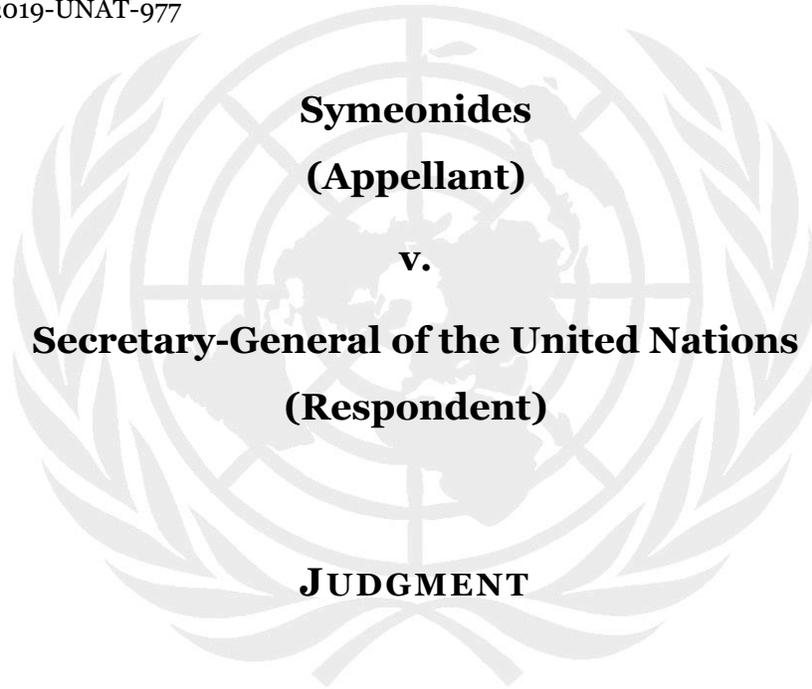




**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2019-UNAT-977



**Symeonides  
(Appellant)**

**v.**

**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

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Before:	Judge Martha Halfeld, Presiding Judge John Raymond Murphy Judge Kanwaldeep Sandhu
Case No.:	2019-1270
Date:	25 October 2019
Registrar:	Weicheng Lin

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Counsel for Mr. Symeonides: Flogaitis Spyridon

Counsel for Secretary-General: Patricia C. Aragonés

**JUDGE MARTHA HALFELD, PRESIDING.**

1. Mr. Spyros Symeonides is a staff member of the United Nations Peacekeeping Force in Cyprus (UNFICYP). He complained that since he joined UNFICYP in 2000 he had been required to work additional hours without compensation, and that this matter had been brought to the attention of his supervisors, but to no avail. In his application to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Mr. Symeonides alleged that the UNFICYP Administration had violated Staff Rule 3.11 and the UNFICYP administrative circular governing compensation for overtime work. He also alleged harassment and abuse of authority by his supervisors and failure to complete his performance evaluation. The Dispute Tribunal, by way of a summary judgment, dismissed Mr. Symeonides' application as not receivable *ratione materiae*. For reasons set forth below, we affirm the UNDT Judgment.

**Facts and Procedure**

2. Mr. Symeonides joined the Procurement Section of UNFICYP on 6 November 2000. He has been working in the same section since then.

3. According to Mr. Symeonides, in 2006, a post within the Procurement Section was redeployed to the Finance Section on a temporary basis. However, to date, this post is still in the Finance Section. The temporary redeployment led to understaffing and the redistribution of the workload among the remaining staff in the Procurement Section. As a result, additional work hours were required to fulfil the Procurement Section's operational requirements. In the case of Mr. Symeonides, since he joined UNFICYP in 2000, he has been working additional hours, without compensation, beyond working hours and days, in order to meet set deadlines, on average two and a half to three hours daily, including some weekends. The stressful working environment made it impossible for him to take annual leave at a desirable time. It has also impacted his health. That he worked beyond regular working hours was acknowledged by his supervisors and colleagues. While no additional staff was hired for the Procurement Section, he and his colleagues had to provide additional administrative and logistical support to some other organizations including the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), and the Operation for the Prohibition of Chemical Weapons–United Nations (OPCW-UN). To make the matter worse, another post of procurement assistant was temporarily reassigned from the Procurement Section to the Integrated Acquisition Unit (IAU) in May 2017.

4. Again, according to Mr. Symeonides, the issue was brought to the attention of his reporting officers “on numerous occasions”, presumably verbally. But none of them relayed his concerns to the Administration. At a meeting on 25 November 2016, Mr. Argyrou, his colleague, raised the issue of additional work hours without adequate compensation with the Chief, Mission Support (CMS).

5. On 7 June 2018, Mr. Symeonides submitted a request for management evaluation of the decision taken by the UNFICYP Administration to redeploy a post of procurement assistant from the Procurement Section to the IAU. Mr. Symeonides claimed that this redeployment created a negative impact on the workload of the Procurement Section. He was seeking “compensation (additional payment) for the additional hours of work that [he had] performed for the Organization”.

6. By letter dated 24 July 2018, the Management Evaluation Unit (MEU) informed Mr. Symeonides of the outcome of the management evaluation. The MEU found that Mr. Symeonides’ management evaluation request had not been filed in a timely manner, as he had failed to file such a request within 60 days from the date on which he had become aware of, or should have reasonably known, the decision not to compensate him for his overtime work. The MEU also found that Mr. Symeonides’ request was not receivable as it related to his allegations of systemic understaffing.

7. On 8 October 2018, Mr. Symeonides filed an application with the Dispute Tribunal alleging breach by the UNFICYP Administration of his contract in violation of Staff Rule 3.11 (Overtime and compensatory time off) and UNFICYP’s Administrative Circular No. 2010-006 (Conditions governing compensation for overtime work). He also alleged that he had been subjected to harassment and abuse of authority by the current and former CMS in violation of Secretary-General’s Bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). He further challenged the failure to complete his 2017-2018 performance evaluation by his Second Reporting Officer within the applicable deadline in violation of Administrative Instruction ST/AI/2010/5 (Performance Management and Development System). Mr. Symeonides sought official acknowledgement of the additional hours of work that he had performed since 6 November 2000 and monetary compensation in respect thereof. But he did not request any remedy in respect of his ST/SGB/2008/5 and ST/AI/2010/5 claims.

8. In Judgment No. UNDT/2019/055, the Dispute Tribunal dismissed Mr. Symeonides' application, concluding that none of his claims were receivable *ratione materiae*. The UNDT found that Mr. Symeonides had failed to identify any specific decision taken by the UNFICYP Administration in respect of his alleged overtime work. Regarding Mr. Symeonides' ST/SGB/2008/5 claim, the Dispute Tribunal agreed with the Secretary-General that ST/SGB/2008/5 set out a separate process for investigation into allegations of harassment and abuse of authority, and that the UNDT did not have jurisdiction to conduct such an investigation. The Dispute Tribunal likewise dismissed as not receivable Mr. Symeonides' claim of delays in the completion of his performance evaluation, because there was no reviewable decision stemming from the said performance evaluation and Mr. Symeonides had not raised any issue related to his performance appraisal in his management evaluation request.

9. Mr. Symeonides appealed the UNDT Judgment to the United Nations Appeals Tribunal (Appeals Tribunal) on 10 June 2019, and the Secretary-General filed his answer on 13 August 2019.

### **Submissions**

#### **Mr. Symeonides' Appeal**

10. The Dispute Tribunal erred in law when it concluded that Mr. Symeonides had failed to identify any specific decision in respect of his alleged overtime work. He was contesting the "continuous, implicit, negative [a]dministrative acts of the Management" towards him, the UNFICYP Administration's repetitive oral refusal to acknowledge his overtime work, and the failure by the supervisor to officially request him to work overtime despite his insistent oral requests to receive overtime compensation. Moreover, the failure by the UNFICYP Administration to implement the approved staffing table of nine posts for the Procurement Section constituted an implied administrative decision. These were "challengeable implied administrative decisions", because they produced a direct and legal effect on his contract as well as adverse consequences on his health. While the CMS instructed Mr. Symeonides and others not to work additional hours at a meeting on 25 November 2016, that instruction was breached subsequently by the repetitive orders to Mr. Symeonides to finish the work before he could leave the office, and he was "forced" to continue to work overtime without any compensation. In this regard, Mr. Symeonides is submitting the written attestations signed by his former colleagues

confirming that he had often worked beyond the normal hours of work due to understaffing in the Procurement Section.

11. The UNFICYP Administration has been taking advantage of Mr. Symeonides' overtime work without providing any compensation over the years in violation of its responsibility to establish a normal working week for its employees. As the "professional malpractice" was "continuous", the Dispute Tribunal should have permitted an "effective toll[ing]" of the applicable time limits to allow Mr. Symeonides to present his claims, and such a tolling is "intuitively deemed justified".

12. The Dispute Tribunal failed to exercise the jurisdiction vested in it by declaring Mr. Symeonides' complaint of harassment and abuse of authority against the CMS as not receivable. It should be noted that, in his e-mail dated 6 March 2018, the CMS used abusive, offensive and harassing language against the Procurement Section, resulting in a breach of his contract with the Organization, which in turn breached the contract between the Organization and Mr. Symeonides.<sup>1</sup>

13. Mr. Symeonides requests that the Appeals Tribunal reverse or modify the impugned Judgment, acknowledge his overtime work and the unsustainability of his working environment and award him adequate compensation.

### **The Secretary-General's Answer**

14. As a procedural matter, the Secretary-General refers to the annexes attached to Mr. Symeonides' appeal including a statement from Mr. Symeonides' wife, two performance evaluation appraisals (2012-2013 and 2017-2018), e-mails from UNFICYP's CMS dated 6 March 2018 and 11 May 2017,<sup>2</sup> minutes of a Procurement Section staff meeting on 11 April 2014, various e-mails sent by Mr. Symeonides after his normal working hours, and two statements by former UNFICYP staff members dated 27 May 2019. The Secretary-General requests that the Appeals Tribunal not admit or consider such evidence, because those additional documents were all available at the time of Mr. Symeonides' UNDT application.

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<sup>1</sup> On 6 March 2018, there was an exchange of e-mails between the CMS and some UNFICYP staff members regarding the lease of right-hand self-drive vehicles. In a response, the CMS wrote: "I just spoke with [the Chief Procurement Officer (CPO)] who is currently on sick leave. I ripped into Procurement as they shouldn't have sent that fax. I just flamed them!!"

<sup>2</sup> Mr. Symeonides did not include an e-mail dated 11 May 2017 in annex 4 to his appeal.

Mr. Symeonides has neither requested leave to the Appeals Tribunal to file them nor complied with the criteria set forth in Article 2(5) of the Appeals Tribunal Statute for doing so.

15. The Dispute Tribunal correctly concluded that Mr. Symeonides' claim regarding compensation for alleged overtime work was not receivable, as he did not identify or provide evidence of any instance in which he had requested to be compensated for overtime work or any instance in which the UNFICYP Administration had denied such a request. Nor was there any evidence showing the failure on the part of the UNFICYP Administration to fulfil its obligation towards Mr. Symeonides or implement any specific decision in his favour.

16. The decisions of the UNFICYP Administration to redeploy staff and not to reverse the redeployment were not appealable as they did not directly impact Mr. Symeonides' terms of appointment. They are of general application rather than individualized decisions producing direct legal consequences for Mr. Symeonides' terms of employment.

17. Contrary to Mr. Symeonides' argument about the need to toll the applicable time limits in case of continuous wrongful occurrence, the jurisprudence of the Appeals Tribunal has not endorsed a flexible approach to time limits.

18. The Dispute Tribunal also correctly concluded that Mr. Symeonides' ST/SGB/2008/5 claim was not receivable, because his failure to file a written complaint under ST/SGB/2008/5 had deprived the Dispute Tribunal of a basis to assert any jurisdiction to inquire into his allegations of harassment and abuse of authority. Moreover, Mr. Symeonides had not claimed harassment or abuse of authority in his request for management evaluation. In this regard, the Secretary-General notes that Mr. Symeonides has submitted, for the first time on appeal, a copy of the e-mail of 6 March 2018, though he referred to it in his UNDT application. Nonetheless, this submission does not change the fact that he did not file a written complaint pursuant to ST/SGB/2008/5.

19. The Dispute Tribunal further correctly concluded that Mr. Symeonides' claim regarding the delay in the completion of his performance evaluation appraisal was not receivable. The Secretary-General notes that Mr. Symeonides does not challenge the Dispute Tribunal's holding in this regard.

20. The Secretary-General requests that the Appeals Tribunal dismiss the appeal and affirm the impugned Judgment.

### **Considerations**

21. In his appeal, Mr. Symeonides does not challenge the UNDT's finding that his application was not receivable with regard to the performance evaluation issue he had raised. Of the three causes of action that he brought, Mr. Symeonides seeks reversal of the impugned Judgment with respect to only two of them. In this respect, he requests "acknowledgment of his overtime work and the unsustainability of his working environment" as well as "adequate compensation".

22. Mr. Symeonides contends that, because of work requirements, he has been working overtime, averaging two and a half to three hours daily including some weekends since he was hired, and that this has affected his health and family life as well as the periods of his annual leave. He claims that the issues in his work environment including the inappropriate pressure from the hierarchy were brought to the attention of his superiors, but in vain.

23. Regarding Mr. Symeonides' request for compensation for overtime work, the UNDT found that the application was not receivable since he had failed to identify any specific decision taken by the Administration in respect of his alleged overtime work. To refute the UNDT's finding, Mr. Symeonides brings up the notion of an implied administrative decision, arguing that the continuous actions of the Administration requiring him to work overtime without compensation amounted to a challengeable implied administrative decision. In order to support his allegations, Mr. Symeonides annexes to his appeal letters of certification from two of his former colleagues dated 27 May 2019.

24. First of all, as governed by Article 2 of our Statute, only in exceptional circumstances and where the Appeals Tribunal determines that the facts are likely to be established with documentary evidence may we receive such additional evidence if it is in the interest of justice and the efficient and expeditious resolution of the proceedings. Moreover, the evidence must not have been known to the party, as in such a case, it should have been presented before the Dispute Tribunal.

25. In other words, a party may not submit additional evidence to the Appeals Tribunal if it was available to him or her and could have been submitted to the UNDT. In the absence of any reason to the contrary, we find that had Mr. Symeonides acted with due diligence, he should have been able to produce the documents before the Dispute Tribunal. Mr. Symeonides ought to have thus sought the Appeals Tribunal's permission to file such additional evidence explaining why he had been prevented from filing it before the UNDT.<sup>3</sup>

26. Even when a party requests proper leave, the Appeals Tribunal will only admit additional evidence including written testimony if the facts are likely to be established with such documentary evidence. In this case, not only should a party demonstrate its relevance, but also that this evidence was not known to him or her at the time of the UNDT proceedings. This is because the Appeals Tribunal is not ordinarily a fact-finding instance. All the facts must be presented to, and assessed by, the trial judge, the most competent to undertake a complete appraisal of the factual context. The Appeals Tribunal, being the instance of last resort, should restrict its analysis of facts within the limits of its Statute, that is, when the UNDT erred on a question of fact resulting in a manifestly unreasonable decision.<sup>4</sup>

27. In the present appeal, Mr. Symeonides has annexed some additional documents that were not part of the record before the UNDT. They cannot be admitted, because they mostly predate the filing of his UNDT application and were therefore already available to Mr. Symeonides at that time and should have been produced during the UNDT proceedings. Although a few of them postdate the issuance of the UNDT Judgment, such as the letters of certification of 27 May 2019 by Mr. Symeonides' former colleagues, they relate to facts that had allegedly been established well before the filing of his UNDT application in 2018.

28. The only exception to this is Annex 4 (e-mail of 6 March 2018 from the CMS). Mr. Symeonides should have requested leave to submit that document to the Appeals Tribunal, showing its relevance to the outcome of the case. But he did not do so. In any case, the annex is not admissible because it does not help determine the central issue of the case, i.e., whether there was an appealable administrative decision in the context of overtime work.<sup>5</sup> Therefore, the

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<sup>3</sup> *Chhikara v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-723, para. 27; *Rüger v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-693, paras. 15-16; *Shakir v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-056, para. 12.

<sup>4</sup> Appeals Tribunal Statute, Article 2(1)(e).

<sup>5</sup> *Mbok v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-824, para. 37.

Appeals Tribunal considers the annexes to Mr. Symeonides' appeal not receivable, except the copy of the impugned Judgment.

29. Further, it is undeniable that the actions on the part of the Administration regarding the daily practices of its staff members might be doctrinally considered as administrative decisions. However, for the purposes of filing a valid application before the UNDT, a party must identify an administrative decision, express or implied, which has allegedly affected a staff member's conditions of service.<sup>6</sup> This is because the competence of the UNDT, as established by Article 2 of its Statute, is dependent upon the existence of an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. As we have stated in *Lloret Alcañiz et al.*, an administrative decision is a unilateral decision of an administrative nature taken by the Administration involving the exercise of power or the performance of a function in terms of a statutory instrument, which adversely affects the rights of another and produces direct legal consequences. A decision of an administrative nature is distinguished from other governmental action of a regulatory, legislative or executive nature.<sup>7</sup> In the context of overtime at UNFICYP, the decision takes the form of UNFICYP's rejection of, or its lack of action on, Mr. Symeonides' request for overtime compensation or compensatory time off (CTO).

30. According to Mr. Symeonides, he worked overtime for years without compensation and the issue was raised with the UNFICYP Administration. But he has been unable to provide any evidence showing that he requested overtime compensation in writing, and that the UNFICYP Administration either did not respond or responded negatively to his request for overtime compensation or CTO. As a consequence, he has not complied with the full requirements before filing an application before the UNDT.

31. It should be noted that these requirements contribute to the efficiency of the justice system, since a written request for overtime compensation or CTO provides a basis for requesting management evaluation, which gives the Administration an opportunity to reassess the case and correct a possible mistake or decide to provide for a proper remedy. As stated in Article 8(1)(c) of the UNDT Statute, an application is only receivable if the applicant has

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<sup>6</sup> *Farzin v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-917, paras. 38-41; *Kozul-Wright v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-843, para. 56.

<sup>7</sup> *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 61.

previously submitted the contested administrative decision for management evaluation, where required. According to Staff Rule 11.2(a), a staff member wishing to formally contest an administrative decision alleged to be in non-compliance with his or her contract of employment or terms of appointment shall, as a first step, submit to the Secretary-General a written request for management evaluation of the administrative decision. Hence, a party must have submitted such a request previously to the Administration before coming to the tribunals.<sup>8</sup> Mr. Symeonides did not do that.

32. Similarly, as regards his allegations of harassment and abuse of power, Mr. Symeonides should have followed the established procedure set forth in Secretary-General's Bulletin ST/SGB/2008/5, particularly Section 5.1 and following, which provides an informal and a formal process for addressing such allegations.

33. Section 5.11 of ST/SGB/2008/5 establishes that when a case has not been resolved by informal resolution, the aggrieved individual willing to take forward his or her demand shall submit a written complaint to the head of department, office or mission concerned or to the hierarchy, except when the above-referenced official is the alleged offender. Upon receipt of a formal complaint, the responsible official will, according to Section 5.14 of the Bulletin, promptly review the complaint and take appropriate measures, which could include the formation of a fact-finding investigation. Thus, in harassment and abuse of authority cases, between ST/SGB/2008/5 and the jurisdiction of both the Dispute and the Appeals Tribunals lies a continuum of substantial and procedural protection for both the complainants and the alleged offenders.<sup>9</sup> In other words, before a staff member may file an ST/SGB/2008/5 complaint with the UNDT, he or she must have exhausted the internal remedies set forth in the Secretary-General's Bulletin by submitting a written complaint to the head of office, who will promptly review and decide whether it warrants an investigation.<sup>10</sup> In the present case, however, Mr. Symeonides never filed a complaint of harassment and abuse of authority against his supervisors. The inclusion of this claim in his UNDT application seems to be an afterthought, as he did not allege such harassment and abuse of authority in his request for management evaluation.

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<sup>8</sup> *Seyfollahzadeh v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-620, para. 14; *Amany v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-521, paras. 15-17.

<sup>9</sup> *Luwai v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-417, para. 65.

<sup>10</sup> *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099, paras. 36-40.

34. In view of the foregoing, the UNDT correctly determined that Mr. Symeonides' application in respect of his overtime work and his allegations of harassment and abuse of authority was not receivable.

**Judgment**

35. The appeal is dismissed and Judgment No. UNDT/2019/055 is hereby affirmed.

Original and Authoritative Version: English

Dated this 25<sup>th</sup> day of October 2019 in New York, United States.

*(Signed)*

Judge Halfeld, Presiding

*(Signed)*

Judge Murphy

*(Signed)*

Judge Sandhu

Entered in the Register on this 30<sup>th</sup> day of December 2019 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar